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PETITION AND SUPPORTING BRIEF.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 364

VIRGIL E. BARKMAN,

Petitioner,

versus

JOSEPH W. SANFORD, WARDEN, UNITED STATES PENITENTIARY, ATLANTA, GEORGIA,

Respondent.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit

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DAVID B. ALFORD,
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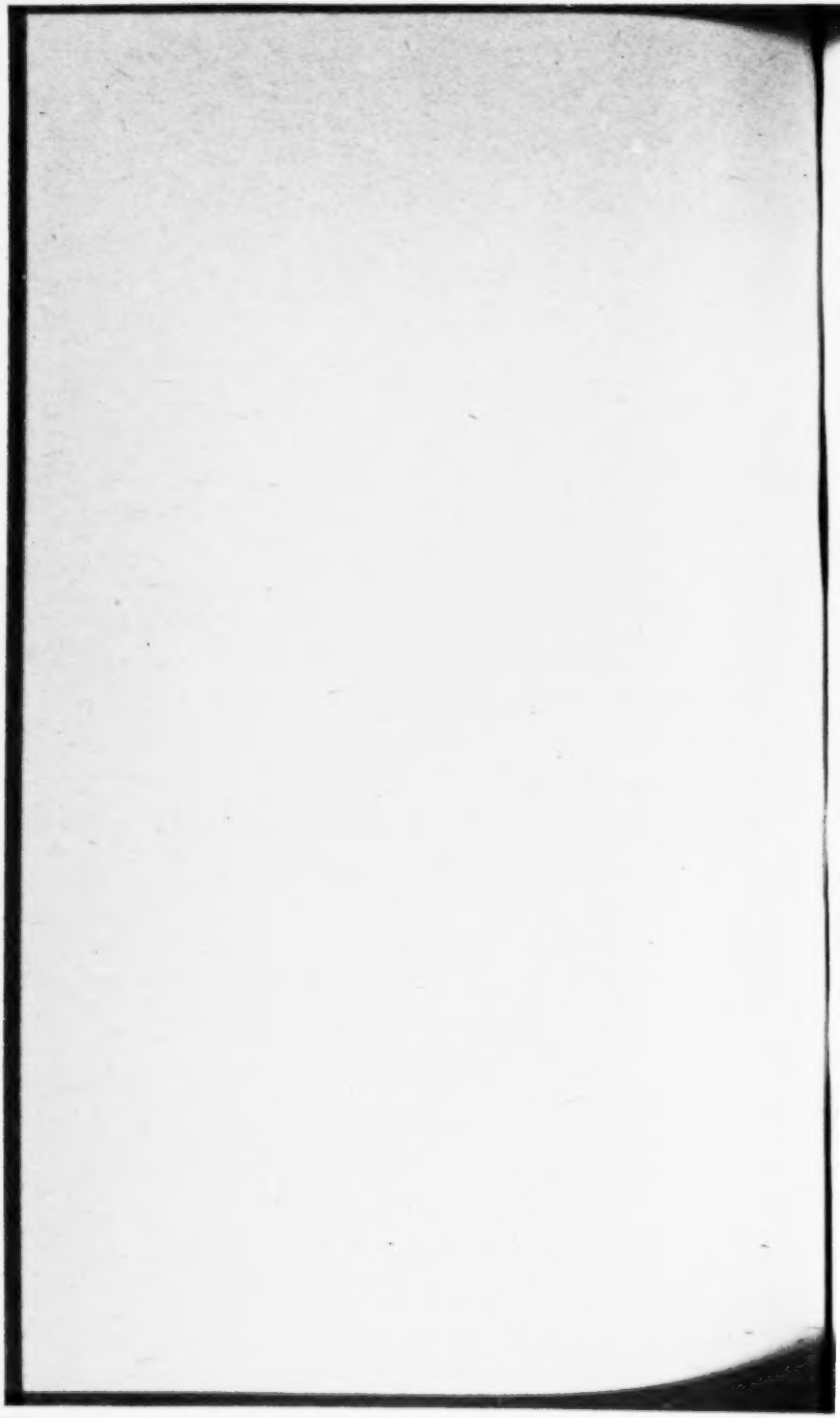

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TO THE HONORABLE THE SUPREME COURT OF THE UNITED STATES:

The petition of Virgil E. Barkman respectfully prays for a writ of certiorari to the United States Circuit Court of Appeals, Fifth Circuit, to review the decision of said Court rendered the 24th day of June, 1947.

The opinion sought to be reviewed is annexed to the transcript of record filed herewith.

This Court has jurisdiction to review said decision under section 240 of the Judicial Code (28 USC §347).

The statute involved is section 7 of the Federal Rules of

Criminal Procedure permitting defendant to waive indictment for a felony and to consent to trial on an information.

The case has arisen by habeas corpus by petitioner against the respondent in the United States District Court for the Northern District of Georgia on the ground said Rule 7 is unconstitutional as contrary to Amendment 5 of the United States Constitution, and that petitioner's imprisonment is illegal under judgment of conviction in the United States District Court for the Eastern District of Arkansas, Western Division, case number Cr. 14,484, July 8, 1946, after petitioner's waiver of indictment under Rule 7. The writ was discharged by the District Court and the judgment affirmed by the Circuit Court of Appeals.

The questions which are submitted for the Supreme Court's consideration are:

1. Are subdivisions (a) and (b) of Rule 7 of the Federal Rules of Criminal Procedure in violation of Amendment 5 of the Constitution of the United States and unconstitutional?

2. Did the United States District Court for the Eastern District of Arkansas, Western Division, have jurisdiction without an indictment, upon petitioner's waiver thereof, to try and to convict the petitioner?

The reason the said judgment should be reviewed by this Court is that the Circuit Court of Appeals has decided an important question of Federal law, which has not been, but should be, settled by this Court; and said decision is contrary to the settled law of the land.

WHEREFORE, your petitioner prays that a writ of certiorari may be issued by this Court.

DAVID B. ALFORD,
Attorney for Petitioner,
Office & P. O. Address
Middleburgh, New York

STATE OF NEW YORK
COUNTY OF SCHOHARIE SS.:
TOWN OF MIDDLEBURGH

DAVID B. ALFORD being duly sworn deposes and says: I am the attorney for the petitioner herein and reside and have my office at Middleburgh, New York. I have read the foregoing petition and know the contents thereof and the same is true to my own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters I believe it to be true. The reason this verification is made by me and not by the petitioner is that the petitioner is not within the County of Schoharie in which County I have my office.

The sources of my information and the grounds for my belief are conversations with the petitioner and papers and documents in my possession.

DAVID B. ALFORD

Sworn to before me this 10th
day of September, 1947.

LORENE A. PICKETT,
Notary Public — No. 101
Schoharie County.
My comm. expires 3|30|49.

SUPPORTING BRIEF

The decision is contrary to the settled law of the land that without an indictment by a grand jury a court has not jurisdiction to try a person for a felony.

This court said in *Ex Parte Bain*, 121 U.S. 13, that the indictment was "a prerequisite to a prisoner's trial for a crime and without which the Constitution says 'no person shall be held to answer.'"

A similar provision in the New York State Code of Criminal Procedure was held unconstitutional by the Court of Appeals in *People ex rel. Battista v. Christian*, 249 N.Y. 314.

The following states have held waivers of indictment void:

U.S.—*Ex Parte McClusky*, 40 Fed. 71.

Alabama—*Kyser v. State*, 22 Ala. App. 431, 177 So. 157. *Finley v. State*, 61 Ala. 201.

Arizona—*Territory of Arizona v. Blomberg*, 2 Ariz. 204, 11 Pac. 671.

Georgia—*Wright v. State*, 16 Ga. App. 216.

Illinois—*Peo. v. Minto*, 318 Ill. 293, 149 NE 241. *Peo. v. Gray*, 261 Ill. 140.

Mississippi—*Newcomb v. State*, 37 Mississippi 383.

New Jersey—*Richardson v. State Board of Control*, 98 N.J.L. 690, Aff. 99 N.J.L. 516.

New York—*Peo. ex rel. Battista v. Christian*, 249 N.Y. 314.

North Carolina—*State v. Queen*, 91 N.C. 659. *State v. Lochman*, 98 N.C. 763.

Ohio—*Doyle v. State*, 17 Ohio 222.

Pennsylvania—*Com. ex rel. Fagen v. Francies*, 53 Pa. Super. Ct. 278.

Tennessee—*Rice v. State*, 3 Heisk 215.

Texas—*Rainey v. State*, 19 Tex. App. 479.

West Virginia—*Lemons v. State*, 4 W. Va. 755.

Vermont—*State v. Stimpson*, 78 Vt. 124, 62 Atlantic 14.

Although the rule was promulgated by the Supreme Court and we should "tread lightly," as suggested by the decision below, it is respectfully submitted that prior decisions have suggested that neither Congress nor the Courts have the power to alter the constitutional provisions for indictment. This Court stated in *Ex Parte Wilson*, 114 U.S. 426, "the purpose of the amendment was to limit the powers of the legislature as well as of the prosecuting officers of the United States, and no declaration of Congress that a crime is infamous is needed to secure, or competent to defeat, the constitutional safeguard."

In *United States v. Shepard*, 1 Abb. W.S. 431, Federal Cases, No. 16,273, the court said: "The amendment (5th) however, fixed the matter, *beyond the power of Congress or the Courts* (emphasis supplied) to alter the course of

proceeding in bringing forward a charge of crime in the class of cases embraced by the provision."

Far from being a boon to indigent defendants as decried by some of its exponents, Rule 7 is an unconscionable weapon in the hands of a prosecutor against him. Apparently no one has ever presented a defendant's view of the rule to this Court.

The petitioner should have an opportunity to establish the unconstitutionality of the rule in this Court which promulgated it.

Respectfully submitted,

DAVID B. ALFORD,
Attorney for Petitioner,
Office & P. O. Address
Middleburgh, New York